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No. 04-609

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOHN WASHINGTON HIGHTOWER,

Petitioner,

v.

DERRICK SCHOFIELD, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION PRISON,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

1.

Whether certiorari should be denied when the Eleventh Circuit properly concluded that the Georgia Supreme Court had reasonably applied this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), in affirming the denial of federal habeas corpus relief as to Petitioner's *Batson* claim?

2.

Whether the Eleventh Circuit properly concluded that the Georgia Supreme Court's decision was not contrary to, nor involved an unreasonable application of, this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), which decision did not mandate that a defendant has a right to an *ex parte* hearing to determine whether a defendant can make the necessary predicate showing of *Ake*?

3.

Whether Petitioner's mere disagreement with the conclusions reached by the Georgia courts and the Eleventh Circuit's application of AEDPA standards fails to warrant this Court's exercise of its certiorari jurisdiction?

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PART ONE

STATEMENT OF THE CASE

Petitioner, John Washington Hightower, was tried on an indictment returned on July 14, 1987, in the Superior Court of Baldwin County, Georgia, on three counts of malice murder in connection with the shooting deaths of Dorothy Hightower, Petitioner's wife, and Dorothy's daughters, Sandra and Evelyn Reaves, whose murders occurred on July 12, 1987. A change of venue was granted and the actual trial took place in the Superior Court of Morgan County.

On August 6, 1987, Petitioner's counsel filed a "Motion for Funds to Hire Independent Psychiatrists" which motion was argued during a hearing conducted on August 31, 1987. During this hearing, trial counsel argued that they should be allowed to argue this motion "without either the presence or participation of the [prosecutor]." The trial court denied this request and allowed the prosecutor to be present during this hearing and during other hearings in which Petitioner's counsel requested funds for psychiatric experts.

Following a hearing, the trial court granted Petitioner $750 for a psychiatric expert, leaving open the possibility of more funds being granted during a subsequent hearing and a lump sum of $5,000 for defense expenses. On November 25, 1987, the trial court ordered that psychologist Dr. Archer Moore be paid $440, leaving the remainder of the $750 available for use by defense counsel.

On February 8, 1988, defense counsel filed a motion for additional funds to hire a psychiatrist and this motion was heard on February 9, 1988. Trial counsel informed the

court that they had used the $5,750 dollars allotted to them to pay Dr. Moore and to hire a jury specialist and investigator. The trial court denied their motion for additional funds. The record also shows that part of the funds allotted to defense counsel was used to pay psychologist Dr. Howard Albrecht who testified for the defense during the sentencing phase.

Petitioner's trial began on April 28, 1988, and concluded on May 4, 1988. Petitioner was found guilty on all three counts of murder and received the death penalty. The jury's recommendation of death was based on the following statutory aggravating circumstances: that the murder of Dorothy Hightower was committed while the Petitioner was engaged in the commission of the murder of Evelyn Reaves; that the murder of Sandra Reaves was committed while the Petitioner was engaged in the commission of the murder of Dorothy Hightower; and, that the murder of Evelyn Reaves was committed while the Petitioner was engaged in the commission of the murder of Sandra Reaves.

Petitioner's motion for new trial was denied on June 28, 1989. On direct appeal, the Supreme Court of Georgia affirmed Petitioner's convictions and sentences on November 30, 1989, in *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509 (1989). The Georgia Supreme Court found that the trial court had correctly rejected Petitioner's claim raised pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). The Georgia Supreme Court concluded that "the trial court found that the prosecutor had articulated legitimate non-racial reasons for his challenges. Even assuming the defendant made out a prima facie case, [citation omitted] the trial court's determination is not clearly erroneous." *Hightower v. State*, 259 Ga. 770, 773 (1989).

On direct appeal, the Georgia Supreme Court also concluded that Petitioner had not established a violation of *Ake v. Oklahoma*, 470 U.S. 68 (1985) and that "the defendant has not shown any harm from the denial of an *ex parte* hearing on the funds issue." *Hightower v. State*, 259 Ga. 770, 771 (1989). Petitioner's motion for reconsideration was denied by the Georgia Supreme Court on December 22, 1989.

Petitioner filed a petition for a writ of certiorari in this Court on July 20, 1990. This Court denied the petition for a writ of certiorari on October 1, 1990, in *Hightower v. Georgia*, 498 U.S. 882 (1990), and denied rehearing on November 26, 1990, in *Hightower v. Georgia*, 498 U.S. 995 (1990).

Petitioner filed a state habeas corpus petition in the Superior Court of Butts County on July 9, 1991, and filed an amended petition for state habeas corpus relief on January 25, 1993. A state habeas corpus hearing was conducted in the Superior Court of Butts County on January 25, 1993. State habeas corpus relief was denied on January 18, 1994.

Petitioner filed an application for a certificate of probable cause to appeal from the denial of state habeas corpus relief in the Supreme Court of Georgia on January 18, 1994. The Supreme Court of Georgia denied the application for a certificate of probable cause to appeal on November 3, 1994. Petitioner's motion for reconsideration was denied on December 2, 1994.

Petitioner filed a petition for a writ of certiorari in this Court on April 18, 1995, and the petition was denied on June 26, 1995. *Hightower v. Thomas*, 515 U.S. 1162 (1995). Petitioner's petition for rehearing filed on July 20, 1995,

was subsequently denied on September 1, 1995. *Hightower v. Thomas*, 515 U.S. 1183 (1995).

On November 26, 1996, Petitioner filed an application for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, Athens Division. Respondent filed a Response to Petitioner's Petition for Writ of Habeas Corpus on March 13, 1997 and also filed a Notice of Filing of various documents to be utilized by the district court in considering Petitioner's amended petition for writ of habeas corpus.

On August 6, 1999, the federal district court denied Petitioner federal habeas corpus relief. Petitioner's motion to alter and amend judgment was denied on September 27, 1999. On January 23, 2001, the district court granted Petitioner's motion for a certificate of appealability.

On April 12, 2004, the Eleventh Circuit affirmed the federal habeas corpus court's denial of federal habeas corpus relief. In affirming the denial of habeas corpus relief as to Petitioner's *Batson* and *Ake* claims, the Eleventh Circuit emphasized that its review was constrained by 28 U.S.C. § 2254. *See Hightower v. Schofield*, 365 F.3d 1008, 1035 (11th Cir. 2004). On May 3, 2004, Petitioner filed a petition for rehearing *en banc*, which was denied on June 4, 2004. Petitioner bases the instant petition for a writ of certiorari on the Eleventh Circuit's rejection of his *Batson* and *Ake* claims and the deference given by the Eleventh Circuit to the resolution of these claims by the state courts.

PART TWO

STATEMENT OF THE FACTS

In reviewing Petitioner's case on direct appeal, the Supreme Court of Georgia summarized the evidence presented in Petitioner's case as follows:

> The defendant was married to Dorothy Hightower. Her brother stopped by their home early in the morning of July 12, 1987, to pick up his daughter. Dorothy Hightower's car was gone. The brother entered the home and found that Dorothy Hightower and her two daughters, Evelyn and Sandra Reaves, had been shot. Evelyn Reaves was still alive, but died two days later. Sandra Reaves and Dorothy Hightower were dead. The brother's daughter was unharmed.
>
> Two and one-half hours later, the defendant was arrested driving his wife's car. Inside the car was a bloody handgun. He confessed later that morning. He told police that he and his wife had been having marital problems, and he had purchased the murder weapon the day before. He hid it under his pillow until 3:00 a.m., when he shot his wife. He then went to the bedroom occupied by his stepdaughter Sandra Reaves. She got out of bed, but then lay back down. He shot her in the head. Evelyn Reaves tried to leave the house, but the defendant caught her and shot her three times. He stated that he did not harm his niece because he "didn't have any problems with the baby."

Hightower v. State, 259 Ga. 770, 771 (1989).

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE ELEVENTH CIRCUIT PROPERLY CONCLUDED THAT THE GEORGIA SUPREME COURT HAD REASONABLY APPLIED THIS COURT'S DECISION IN *BATSON V. KENTUCKY*, 476 U.S. 79 (1986), IN AFFIRMING THE DENIAL OF FEDERAL HABEAS CORPUS RELIEF TO PETITIONER AS TO PETITIONER'S *BATSON* CLAIM.

Petitioner requests that certiorari be granted based on his assertion that in rejecting Petitioner's claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), the state trial court allegedly failed to follow this Court's three-step analysis for reviewing such claims and that if a proper analysis had been conducted, the trial court would have concluded that the prosecutor discriminatorily exercised his peremptory strikes. However, Petitioner's mere disagreement with the conclusions reached by the trial court and the Georgia Supreme Court in rejecting Petitioner's *Batson* claim and the Eleventh Circuit's proper application of AEDPA standards in reviewing this claim, fails to warrant this Court's exercise of its certiorari jurisdiction. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("[w]e do not grant a certiorari to review evidence and to discuss specific facts.").

In reviewing Petitioner's *Batson* claim on appeal from the denial of federal habeas corpus relief, the Eleventh Circuit properly circumscribed its review of the state courts' resolution of Petitioner's *Batson* claim as limited to determining whether the state courts had conformed to this Court's precedent at the time of their decisions while properly declining to review Petitioner's *Batson* claim as if

it were a matter of first impression in the Eleventh Circuit. The Eleventh Circuit correctly noted,

> Mindful of our role in habeas proceedings, we focus our analysis upon the correctness of the supreme court's judgment. That court assumed that Hightower had made out a *prima facie* case, but denied his claim nonetheless. Our task is to consider whether this judgment "was contrary to, or an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. Section 2254(d).

Hightower v. Schofield, 365 F.3d at 1034.

As the Eleventh Circuit noted, the analysis of the *Batson* claim performed by the Georgia Supreme Court was in accordance with the *Batson* test, as the Georgia Supreme Court merely assumed that a *prima facie* case of discrimination had been established in reviewing the prosecutor's proffered reasons for his strikes, thereby engaging in the first step of a *Batson* analysis. *Hightower v. Schofield*, 365 F.3d at 1033, citing *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509, 512 (1989).

The Eleventh Circuit also properly determined that the Georgia Supreme Court reasonably performed the second part of a *Batson* analysis by reviewing the "facial validity of the prosecutor's explanation." *Hightower v. Schofield*, 365 F.3d at 1033-1034, citing *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509, 512 (1989).

Finally, with regard to the third step of a *Batson* analysis, the Eleventh Circuit properly concluded that the Georgia Supreme Court reasonably applied *Batson* in concluding that Petitioner had "failed to establish purposeful

discrimination." *Hightower v. Schofield*, 365 F.3d at 1034, citing *Hightower v. State*, 259 Ga. 770, 386 S.E.2d 509, 512 (1989).

As required by this Court's decision in *Batson*, the Eleventh Circuit correctly reviewed the trial court record to determine whether the record established that the trial court had "considered both sides of the question" in finding that the allegation of discrimination had been sufficiently rebutted by the prosecution. *Hightower v. Schofield*, 365 F.3d at 1035. The Eleventh Circuit's review of the record warranted the conclusion that, "the *Batson* mechanism, which is necessary deferential to trial court findings, operated properly in this case. *See Miller-El*, 537 U.S. at 339, 123 S.Ct. at 1040 ('The issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible.')." *Hightower v. Schofield*, 365 F.3d at 1035.

Petitioner's reliance on *Coulter v. Gilmore*, 155 F.3d 912 (7th Cir. 1998), as alleged support for his position that the trial judge had to engage in a review of similarly situated jurors in order to satisfy *Batson*'s third prong, is misplaced. In *Coulter*, "the trial judge completely bypassed the stage at which the defendant objects to the state's use of its peremptory challenges and establishes his *prima facie* case of purposeful discrimination in a deliberate proceeding. [i.e., the first prong of *Batson*]. The lack of a proper *Batson* structure led to a record so opaque that it required a remand to illuminate the judge's reasoning process." *Coulter v. Gilmore*, 155 F.3d 912, 918 (7th Cir. 1998).

By contrast, in Petitioner's case, the trial judge did engage in the initial inquiry required under *Batson*, and

ruled that the Petitioner did not meet the first prong of *Batson* after hearing from both the defense and the prosecution. Therefore, the proper *Batson* test which was applied by the trial court in Petitioner's case is distinguishable from the deficient test utilized by the Court in *Coulter*. *Coulter* also is distinguishable from Petitioner's case because it utilized pre-AEDPA standards for reviewing the *Batson* claim and explicitly stated that, "We express no opinion on how this case would be resolved under the far more deferential rules established by the AEDPA." *Id*. at 922.

The Eleventh Circuit correctly examined the trial court record and the findings of the Georgia Supreme Court in determining whether the state courts had properly applied *Batson* and Petitioner's disagreement with the fact-specific application of those standards presents nothing for review by this Court. As this Court has instructed that, "This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 617 (1974).

In performing its role as a federal habeas corpus court, the Eleventh Circuit's properly circumscribed review of whether the trial court and the Georgia Supreme Court had reasonably applied *Batson* presents nothing for review by this Court.[1]

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[1] Due to this Court's direction that proper deference be accorded to the factual findings made by a trial court in reviewing a *Batson* claim, this Court need not grant certiorari to address the factual issue of whether the evidence establishes discriminatory exercise of peremptory strikes by the prosecutor. *See Batson v. Kentucky*, 476 U.S. at 97.

II. THE ELEVENTH CIRCUIT'S PROPER REVIEW OF THE GEORGIA SUPREME COURT'S RESOLUTION OF PETITIONER'S CLAIM UNDER *AKE v. OKLAHOMA*, 470 U.S. 68 (1985) PRESENTS NO ISSUE WHICH WARRANTS THIS COURT'S EXERCISE OF ITS CERTIORARI JURISDICTION.

Petitioner's assertion that this Court should grant certiorari to review his "*Ake* claim" is premised on his unsubstantiated assertion that this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), mandated that initial *Ake* showings must be made *ex parte*.[2] However, this Court in *Ake* did not mandate that *Ake* hearings be conducted *ex parte*, but limited its holding to the conclusion that, "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. at 83.

Additionally, because this Court expressly left to the states the procedural implementation of an indigent defendant's rights under *Ake*,[3] the Eleventh Circuit's habeas corpus review of the Georgia Supreme Court's

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[2] The record is clear that Petitioner has no basis for any "traditional" *Ake* claim as he was granted funds for a psychiatric expert and in fact, retained the services of two mental health experts. Additionally, Petitioner was granted $5000.00 which he could have chosen to spend on a psychiatrist or additional psychiatric examinations.

[3] *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

finding that the denial of an *ex parte* hearing did not prejudice Petitioner was appropriately deferential.[4]

In properly deferring to the Georgia Supreme Court's rejection of the part of Petitioner's *Ake* claim based on the purported *ex parte* requirement, the Eleventh Circuit noted that Petitioner claimed that he had established an *Ake* violation based on the following language from this Court's decision in *Ake*: "When a defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." *Hightower v. Schofield*, 365 F.3d at 1027, citing *Ake*, 470 U.S. at 82-83.

However, the Eleventh Circuit rejected Petitioner's assertion that this Court had mandated that *Ake* hearings be heard *ex parte*, as had the Georgia Supreme Court in *Brooks v. State*,[5] observing that, "Hightower has expended substantial effort in seeking to convince us that the Supreme Court, through this single sentence, incorporated the *ex parte* requirement into Ake's central holding. This effort is misdirected. Since Hightower raised this claim on direct appeal, we focus upon how the Georgia Supreme Court disposed of it, rather than how we would dispose of it on first impression." *Hightower v. Schofield*, 365 F. 3d 1027.

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[4] Prior to the direct appeal decision in Petitioner's case, the Georgia Supreme Court, in *Brooks v. State*, 259 Ga. 562, 564 (1989), found that, "We have found no clear authority, and the parties have shown us none, mandating that hearings on motions for public funds be held ex parte. The Ake holding does not clearly mandate that the hearing be held ex parte."

[5] *See Brooks v. State*, 259 Ga. 562, 564 (1989).

Since this Court did not mandate *ex parte Ake* hearings, the decisions of the Georgia Supreme Court and the Eleventh Circuit declining to adopt an *ex parte* requirement for *Ake* hearings, in the absence of this Court's direction to do so, presents nothing for review by this Court by means of the instant petition for a writ of certiorari. This issue was properly adjudicated in the state courts as envisioned by this Court in *Ake* and therefore, this petition should be denied.

Insofar as Petitioner asserts that there allegedly exists a "conflict in the circuits" over whether *Ake* hearings should be heard *ex parte*, any such alleged conflict does not warrant the granting of certiorari, since, as previously noted, this Court in *Ake* expressly left to the states the right to determine how to implement *Ake*. Therefore, the adoption of varying approaches by various jurisdictions does not present any issue worthy of review by this Court.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for a writ of certiorari seeking review of the Eleventh Circuit decision affirming the denial of federal habeas corpus relief to Petitioner.

Respectfully submitted,

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